

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS

STEPHEN B. JONES, et al.

Plaintiffs,

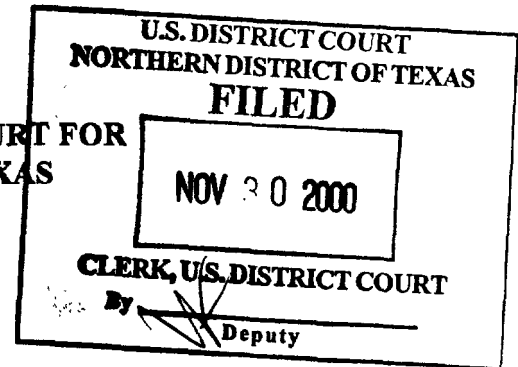
v.

GOVERNOR GEORGE W. BUSH,
et al,

Defendants.

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CIVIL ACTION NUMBER
3:00-CV2543-D



DEFENDANTS ERNEST ANGELO, GAYLE WEST, JOSEPH I. O'NEILL, III, BETSY LAKE, JIM HAMLIN, MARY E. COWART, MICHAEL DUGAS, AND JOHN ABNEY CULBERSON'S RESPONSE TO PLAINTIFFS' BRIEF IN SUPPORT OF THEIR APPLICATION FOR PRELIMINARY INJUNCTION AND SUPPORTING BRIEF

TO THE HONORABLE JUDGE OF THIS COURT:

Defendants Ernest Angelo, Gayle West, Joseph O'Neil, III, Betsy Lake, Jim Hamlin, Mary E. Cowart, Michael Dugas, and John Abney Culberson, collectively the Elector Defendants, file this Response to Plaintiffs' Brief in Support of Their Application for Preliminary Injunction and Supporting Brief.

Plaintiffs' request for preliminary injunction must be denied. First, this Court lacks the power to grant the requested relief. This Court does not have subject matter jurisdiction over Plaintiffs' lawsuit because Plaintiffs lack standing and Plaintiffs' claim is a non-justiciable political question. This Court also does not have personal jurisdiction over the Texas Electors because they have not all been served with process and for those eight electors who have appeared, a timely motion to dismiss raising defenses under Federal Rule of Civil Procedure 12(b)(2), (4), and (5) was asserted. Second, the requested injunctive relief will disproportionately injure both the Texas Electors and the State of Texas. Plaintiffs have not demonstrated that they will suffer any irreparable

injury; the balancing of the harms weighs against the requested injunction; and the proposed injunction will disserve rather than serve the public interest. Finally, Plaintiffs have not demonstrated a likelihood of success on the merits.

I. This Court Cannot Grant the Injunctive Relief Requested by Plaintiffs Because This Court Lacks Subject Matter Jurisdiction.

As the Elector Defendants noted in their motion to dismiss, this Court lacks subject matter jurisdiction over Plaintiffs' lawsuit. Plaintiffs lack standing to assert their claim because it is based on nothing more than a generalized interest in constitutional government. In addition, Plaintiffs' claim is a non-justiciable political question since its resolution is constitutionally committed to Congress. The Elector Defendants hereby adopt and fully incorporate by reference their motion to dismiss and their brief in support of their motion to dismiss as a part of this response.

Plaintiffs erroneously contend in their preliminary injunction motion that they in fact do have standing. Plaintiffs argue that the anticipated Electoral College vote of the Texas Electors will constitute state action and that injured citizens have standing to challenge unconstitutional state action. Of course, this merely begs the question as to whether Plaintiffs can assert an injury sufficient to confer Article III standing. As noted in the Elector Defendants' motion to dismiss, a general interest in constitutional government has repeatedly been held insufficient to establish standing. Plaintiffs also assert that, as voters, they have standing to assert the constitutional rights of Vice-President Albert Gore and Senator Joseph Lieberman. None of the cases cited by Plaintiffs supports such a notion. These cases at best stand for the proposition that laws that impact candidates might have some "theoretical" and "correlative" effect on voters. They certainly do not address the issue of standing presented in this case, much less hold that any such tentative effect is sufficient to confer Article III standing. Finally, Plaintiffs assert that they have standing to enforce their right to cast a meaningful ballot. The case cited by Plaintiffs does not address the issue of standing. In

addition, this is an odd argument since denying Plaintiffs' request for injunctive relief is the only way to ensure that the votes cast by Texas citizens overwhelmingly in support of Governor Bush and Secretary Chaney will be respected. Plaintiffs are not seeking to effectuate the will of Texas voters as expressed on election day. Rather, they are seeking to overturn that result.

Because this Court lacks subject matter jurisdiction, it cannot grant the injunctive relief requested by Plaintiffs. Subject matter jurisdiction is a threshold issue that must be resolved at the beginning of a lawsuit. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 1012 (1998). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." *Id.* at 94, 118 S.Ct. at 1012 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). Accordingly, this Court lacks power to issue injunctive relief and Plaintiffs' request for a preliminary injunction should be denied. *See Affiliated Professional Home Health Care Agency v. Shalala*, 164 F.3d 282 (5th Cir. 1999) (reversing the trial court's preliminary injunction because the trial court lacked subject matter jurisdiction).

II. This Court Cannot Grant the Injunctive Relief Requested by Plaintiffs Because the Texas Electors Have Not All Been Served With Process.

As of the filing of this brief, Plaintiffs still have not served all of the Texas Electors. Yet, it is the Texas Electors that Plaintiffs seek to enjoin. As an initial matter, the failure to serve the Texas Electors necessarily means that this Court lacks personal jurisdiction over the Texas Electors. Of course, a preliminary injunction cannot be issued by a Court that does not have personal jurisdiction over the parties that it seeks to enjoin. *See Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464 (5th Cir. 1986) (reversing preliminary injunction because district court failed to determine "whether it had jurisdiction over the party enjoined"). Moreover, the Plaintiffs' failure to serve the Texas Electors raises serious due process concerns. The Texas

Electors are entitled to notice and an opportunity to be heard on Plaintiffs' request for preliminary injunction. FED R. CIV. P. 65(a)(1) ("No preliminary injunction shall be issued without notice to the adverse party."). Unless and until all of the Texas Electors are served with process, any injunctive relief is inappropriate.

III. The Injunctive Relief Requested by Plaintiffs Is Inappropriate Because It Will Create Rather Than Prevent Irreparable Harm.

Plaintiffs' request for preliminary injunctive relief should be denied because it will irreparably injure both the Texas Electors and the State of Texas. Rather than preserve the status quo, the injunctive relief requested by Plaintiffs will in fact permanently alter it. Currently, no impediment exists to the Texas Electors' participation (on behalf of the State of Texas and its citizens) in the Electoral College vote. If, however, the injunctive relief requested by Plaintiffs is granted, the Texas Electors will be prevented from participating in the Electoral College vote in a manner that is consistent with the results of the November 7, 2000 election in Texas. The result would be the disenfranchisement of both the Texas Electors and the entire State of Texas from the process of selecting the next President and Vice-President of the United States.¹

This disenfranchisement runs the risk of being permanent. There is only one date set for the Electoral College vote: December 18, 2000. If the Texas Electors are not allowed to cast their votes in a timely fashion because this Court grants a preliminary injunction, then, even if an appellate court later determines such action was reversible error, Texas runs the risk of losing the opportunity to have its voice heard in the election for President and Vice-President. This is tantamount to affording the Plaintiffs the kind of permanent relief that is reserved for final judgment and that cannot be

¹Plaintiffs assert that no disenfranchisement will occur because the Texas Electors can still vote for someone other than Governor Bush and Secretary Cheney. This argument is absurd. Plaintiffs' argument ignores the fact that the citizens of the State of Texas overwhelmingly voted for Governor Bush and Secretary Cheney. Precluding the Texas Electors from voting in accordance with the results of the November 7, 2000 election would overrule the clearly expressed will of the citizens of Texas.

dispensed through a preliminary injunction. *See Enterprise Int'l, Inc.*, 762 F.2d at 475-76. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Where a preliminary injunction will give the plaintiff relief awarded only in a final judgment it must be denied. *See Enterprise Int'l, Inc.*, 762 F.2d at 476. In order to avoid disenfranchising the entire State of Texas, and to truly maintain the status quo, this Court should deny the requested injunctive relief and allow the Texas Electors to vote. The Texas Electors and the State of Texas have no assurance of a remedy if the Court issues the requested injunction. In fact, the Texas Electors and the State of Texas will be without an effective remedy if appellate relief cannot be obtained in time for the Texas Electors to cast their votes. Accordingly, the only way to ensure that the Texas Electors and the State of Texas will be without a remedy is to deny the requested injunctive relief.

Because the requested injunctive relief will disproportionately injure the Texas Electors and the State of Texas, Plaintiffs have failed to satisfy several necessary requirements for a preliminary injunction. First, the fact that Plaintiffs' claims will not be foreclosed if the injunction is denied demonstrates that Plaintiffs will not be irreparably injured. To the contrary, both the Texas Electors and the State of Texas will be facing irreparable injury in the form of disenfranchisement if the Court grants the requested injunction. Second, the disproportionate impact on the Texas Electors and the State of Texas establishes that the balancing of the harms does not favor the Plaintiffs. Finally, the potential disenfranchisement of the Texas Electors and the State of Texas clearly proves that the requested injunction will disserve the public interest. If this Court denies the injunction, there will be no comparable injury to the public interest. Plaintiffs assert that the public interest will be served by enforcing the Constitution. Allowing these issues to be resolved in a manner that preserves the rights of the Texas Electors and the State of Texas to have a voice in this election in the event that

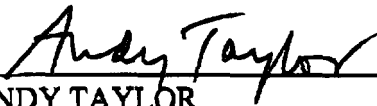
Plaintiffs' claim is eventually dismissed is in no way inconsistent with the public interest. Because Plaintiffs have failed to meet the necessary prerequisites for injunctive relief, Plaintiffs' motion for preliminary injunctive relief should be denied.

IV. Injunctive Relief Should Be Denied Because Plaintiffs Have Not Demonstrated a Likelihood of Success on the Merits.

Plaintiffs have not demonstrated a likelihood of success on the merits. The Texas Electors hereby join, adopt, and fully incorporate by reference Governor Bush and Secretary Cheney's brief in support of their response to Plaintiffs' preliminary injunction motion. Among other things, that brief establishes that Plaintiffs' claim lacks merit because, under any reasonable interpretation of the Twelfth Amendment, there is no constitutional impediment to the Texas Electors casting their votes in a manner that is consistent with the election results in Texas. Accordingly, Plaintiffs' request for preliminary injunction should be denied for the additional reason that there is no likelihood Plaintiffs will succeed on the merits of their claim.

WHEREFORE, PREMISES CONSIDERED, the Texas Electors respectfully request that this Court grant the Texas Electors' motion to dismiss, dismiss Plaintiffs' lawsuit in its entirety, and deny Plaintiffs' request for a preliminary injunction as moot. In the alternative, the Texas Electors respectfully request that Plaintiffs' request for a preliminary injunction be denied. The Texas Electors also request that this Court grant them all other relief to which they may show themselves justly entitled.

Respectfully submitted,
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I hereby certify that a true and correct copy of the foregoing was sent via certified mail, return receipt requested and facsimile this 30~~th~~ day of November, 2000, to:

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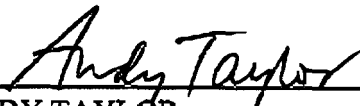
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